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No. 124

In the Supreme Court of the United States

OCTOBER TERM, 1968

JOSEPH AIUPPA,

Petitioner,

vs.

THE UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

Petitioner, Joseph Aiuppa, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Tenth Circuit affirming a judgment of conviction entered by the United States District Court for the District of Kansas.

OPINIONS BELOW

The opinion of the Court of Appeals is not yet reported and is printed in the Appendix to this petition. (Appendix A, *infra* pp. 1-12). Also printed in the Appendix, as

relating to an earlier stage of the case is the opinion of the Court of Appeals for the Tenth Circuit in *Aiuppa* v. *United States,* 338 F.2d 146 (Appendix C, *infra* pp. 13-17).

JURISDICTION

The judgment of the Court of Appeals was entered on April 25, 1968. (Appendix C. *infra* p. 12). The jurisdiction of this Court was invoked under 28 U.S.C. §1254(1).

QUESTIONS PRESENTED

1. When physical evidence and all leads therefrom obtained by an unlawful search and seizure are ordered suppressed pursuant to the mandate from a prior appeal, may the government on the second trial introduce evidence describing such suppressed physical evidence, and use leads obtained therefrom, without establishing lack of taint?

2. May a conviction, even for a petty offense, be supported by assumption and affirmed, absent other proof of the violation?

3. In a criminal trial which had been transferred to a Judicial Division other than that in which the information was filed, because of prejudicial publicity, prevalent throughout the State, and where ten prospective jurors had been excused for opinion or bias obtained from publicity, may a District Judge properly refuse to interrogate the trial jury concerning exposure to admittedly prejudicial accounts appearing in newspapers of general circulation in the State of Kansas in both days of the trial, and brought to the attention of the Court prior to the jury's retirement and deliberation?

4. In a criminal trial which had been transferred from another District in the same State because of publicity, and ten prospective jurors had been excused for opinion or bias arising from publicity, may the jurors be allowed to separate during deliberations with likely exposure to admittedly prejudicial publicity?

5. In light of *Griffin* v. *California,* 380 U.S. 609, may the Court, over specific objections, instruct the jury that a defendant cannot be "compelled" to testify, and no presumption of guilt and no inference of any kind may be drawn, from the "failure" of a defendant to testify?

STATEMENT OF THE CASE

The petitioner was convicted in a trial which lasted two days, by jury, of a third amended information containing two Counts, Count 1 charging the petitioner with unlawful possession of approximately 500 mourning doves, all but 48 of which were in excess of the legal limit in violation of Section 703, T. 16, U.S.C.; Count 2 charged the petitioner, Joseph Aiuppa, without being permitted by regulation, with the transportation of the same mourning doves, also in violation of the same statute.

This was the second trial of the defendant, the first Judgment of the District Court of Kansas, after a trial without a jury, having been reversed for the error of failing to suppress evidence.

After the remand from the first appeal (the opinion in which appears in the appendix hereto as Appendix "C" at appendix pages 13 through 17), the United States Attorney filed a third amended information on February 1, 1965. The original arrest of the petitioner occurred on October 1, 1962. After post trial motions by the de-

fendant were denied in this second trial at Fort Scott, Kansas, the petitioner was sentenced to custody of the Attorney General for a period of three months on October 1, and was fined $500.00 on each of Counts 1 and 2, making a total of 3 months' imprisonment and $1,000 in fines, plus the costs of prosecution.

After the reversal of the first trial, where the petitioner received a similar sentence, Chief Judge Stanley of the District of Kansas entered an order providing as follows:

> "Now on the 2nd day of September, 1965, the defendant's motion to suppress evidence comes on for argument. After hearing arguments of counsel . . . for the defendant and being well advised in the premises, the court finds that all conversations, records, identifications, researches and evidentiary leads emanating from said search and seizure complained of be suppressed." (App. 72)[1]

On June 20, 1966, this cause came on for re-trial before the Hon. George Templar and a jury, at Fort Scott, Kansas. The first trial was at Kansas City, Kansas, and the motion of the petitioner for removal to another Division was granted because of the prejudicial publicity which attended the first trial, both before and during the trial.

In voir dire conducted by Judge Templar, ten of the prospective jurors were excused for cause because they said that they had read of the case in newspapers or had heard about it on radio and television, or had discussed it, and had a bias or an opinion concerning the guilt of the

[1] References to "App." are to the certified Appendix prepared for the Court below and filed with this Petition.

petitioner. These prospective jurors were excused for cause, since the petitioner had only three peremptory challenges under the Federal Rules of Criminal Procedure. (App. 95-141)

After the selection of the jury and prior to the commencement of the reception of evidence, an attorney named Menghinie advised the court and the United States Attorney that he represented a number of witnesses who had been subpoenaed by the Government who felt that under the circumstances that they should refuse to testify as they might incriminate themselves. He further told the court that he represented a Mr. Blunk who at the time of the occurrence of the transaction, was a ward of the court and was judged incompetent and that he had a statement from the doctor stating that at the present time Mr. Blunk was not fit to testify. (App. 146-147)

The first witness for the Government, Andrew Williams (App. 151-167), was permitted to testify over the objection of the petitioner (App. 151-2), that his testimony was the result of a lead emanating from a search which had been held to be illegal. On the hearing on the motion to suppress, Alfred Robinson, a United States Game management agent, testified that it was not until after the car was searched that he knew it contained mourning doves and it was only after he obtained this information that he interviewed Williams. (App. 27)

Andrew Williams testified (App. 151-169) that from September 15 to October 1, 1962, he cleaned doves for many people and stored them at Frontenac, Kansas in the ice box at a Dairy Queen. He was paid by a man named Harold MacMurry for cleaning doves and he imagined that Mr. Aiuppa had paid him because he was keeping his dog. He kept Mr. Aiuppa's dog for four months and he

paid him $150.00, on October 1, 1962. On approximately October 1, 1962 at the request of the petitioner, Williams obtained some dry ice at the ice plant at Pittsburg, Kansas and took it to the Dairy Queen in Frontenac where he broke it into small pieces, and put the ice on top of coolers. He further testified that he put dry ice on top of the cartons and that there were packages in the cartons but that he had never seen the packages opened. He testified that he placed the mourning doves in a sack or plastic bag. He further testified that he cleaned somewhere between 900 and 1400 doves. He also testified that he prepared a plastic bag full of giblets for the petitioner and that after placing the bag in the freezer at the Dairy Queen it was broken and Mr. Aiuppa requested another bag. He further testified that there were cartons that were filled with plastic bags and he placed ice on top of these cartons and he placed one of the cartons in the automobile of the petitioner, but he did not know how many birds were in the carton (App. 161) and he could only assume that other cartons were placed in the Cadillac. The witness did not know how many birds were in the containers but he assumed that there were four or five hundred (App. 164-165).

Mr. Williams testified that Agent Robinson and another agent first contacted him about this case the day after Mr. Aiuppa had left for Chicago and that he had never discussed this matter with them or any one else representing the Government prior to that day. (App. 166-167). He further stated that he cleaned and placed somewhere between 900 and 1400 birds in the ice box at the Dairy Queen, but he did not know how many remained the morning he went over to the Dairy Queen when Mr. Aiuppa was leaving for Chicago but that there were many people who had access to the birds including a Mr. MacMurry

who had removed some birds from the cooler. He did not count any of the birds which he placed in the car of the petitioner and he did not know how many there were remaining in the freezer after he had driven away. He also testified that doves were hunted by large number of persons and frequently they were cleaned and stored and were used for "game feeds" at which many people would attend. (App. 168-169).

Also, during the questioning of this witness by the attorney for the Government, after the witness had been unable to give definite answers to questions by the attorney for the Government, the following occurred:

> Q. Who told you to have a faulty memory?
>
> A. Nobody told me to have a faulty memory.
>
> Mr. Walsh: Object, and move to strike it. I ask the jury be instructed not—to disregard that question and answer.
>
> The Court: Sustained, the jury will disregard it.

On the first trial, the prosecutor had the benefit of Williams' testimony, but also that of the agents who conducted the illegal search and seizure, and the evidence of an ornithologist who established the subject birds as mourning doves, subject to the migratory bird treaties and Acts.

In the second trial, the only evidence offered on these subjects was that of Andrew Williams, because of course, all of the other evidence was suppressed.

Williams testified to his being taken to the United States Commissioner and there charged with a violation of the Migratory Bird Act, and receiving a fine of $50.00 and giving statements to the Game Wardens—all after Aiuppa's arrest and the illegal search and seizure had confirmed the Warden's suspicion that Aiuppa possessed and transported mourning doves.

During the trial of the case, Mr. Blunk was called to testify (App. 175) over the objection of the petitioner (App. 174). He refused to answer questions on the grounds that he feared his testimony might tend to incriminate him.

Hugo Farabi also was called to testify (App. 181-2), and he exercised his privilege against self-incrimination. He further stated that he had advised the prosecutor, through his counsel, prior to being called to testify, that he intended to claim his privilege (App. 181-2).

At the conclusion of the Government's case, the defendant moved for a mistrial based on the ground that he was unduly prejudiced by the prosecutor's action in calling Mr. Farabi and Mr. Blunk to the witness stand when he knew and had been informed by their counsel, that they intended to take the privilege granted to them under the Fifth Amendment of the Constitution of the United States (App. 197).

Petitioner further moved for judgment of acquittal at the end of the Government's evidence (App. 197); prior to ruling on the motion for judgment of acquittal, the court stated that it was having difficulty with reconciling the number of doves that were in the possession of Mr. Aiuppa from the evidence, and the court stated further that it seemed somewhat speculative from the evidence as to the number of doves in his possession, but overruled the motion (App. 200-202). The petitioner then rested (App. 201-202). During the conference on instructions, the petitioner objected to the giving of court's instruction 16 (App. 88-210) on the basis that the manner in which the instruction was phrased that "the law does not compel a defendant in a criminal case to take the witness stand and testify" was prejudicial comment on the failure of the petitioner to testify and also implied that although he could not be

compelled to testify, his testimony would be desirable. The petitioner further objected to giving any instruction on the failure of the petitioner to testify in his own behalf (App. 210-211).

The petitioner then moved for a mistrial based upon two newspaper articles, petitioner's Exhibit "A" and "B" (App. 280-283). The petitioner further moved in lieu of granting a mistrial on the basis of the publicity that the court query the jurors individually and separately out of the presence of the others concerning what they know about these articles, and what they know about other specific articles, and whether they had ever heard Mr. Aiuppa described as a gangland or syndicate hoodlum (App. 215-216). The court relied upon a presumption that the jurors would do their duty and refused to conduct any voir dire examination (App. 216). The case was argued and submitted to the jury, and the jurors were allowed to separate during their deliberations. When they separated, no admonition of any kind was given to them concerning exposure to publicity. They were told only that they were not to talk about the case (App. 242-243). The jury returned a verdict of guilty (App. 88). A timely motion for acquittal notwithstanding the verdict or in the alternative for a new trial was filed on July 7, 1966 (App. 89). This motion was denied on August 19, 1966 (App. 91). On August 19, 1966, the petitioner was sentenced to the custody of the Attorney General for a period of three months on Count One and was fined $500.00 on each of Counts One and Two for a total fine of $1,000.00, and further assessed the cost of prosecution. A timely notice of appeal was filed (App. 93). On appeal the Court below affirmed the judgment of the District Court.

REASONS FOR GRANTING THE WRIT

1. The decision of the United States Court of Appeals for the Tenth Circuit is in conflict with the decision of this Court in *Silverthorne Lumber* v. *United States*, 251 U.S. 385 in that it permits the Government to use evidence obtained from an illegal search and seizure without any showing of lack of taint.

The defendant's original conviction in this cause was reversed by the United States Court of Appeals for the Tenth Circuit on the grounds that agents had illegally searched the automobile of the defendant and found therein the mourning doves which were the object of this prosecution. Pursuant to the mandate of the United States Court of Appeals, Chief Judge Stanley of the District of Kansas entered an order suppressing all evidence obtained in that illegal search and further suppressed all conversations, records, identifications, researches and evidentiary leads emanating from the search.

When the Government's witness, Andrew Williams, was called to testify, defendant objected to his testimony without a showing by the Government that his testimony did not result from a lead emanating by the illegal search and seizure. The trial court overruled this motion solely upon the representation of the Government that no leads were obtained concerning this witness from that search (App. 152).

The Court of Appeals held this procedure to be proper, relying on testimony given in the motion to suppress, prior to the first trial, that prior to the illegal search complained of, agents had received "information from an informer" that the petitioner had been hunting in the area and had killed the doves and that Williams was cleaning the doves,

packaging them and placing them in cold storage. The informer's identity was refused, although repeatedly requested. This reasoning, however, ignores the testimony by the United States Game Management agent who interviewed Williams that it was not until after the automobile of the petitioner had been illegally searched that he knew it contained mourning doves or how many and that it was only after he had obtained this information from the illegal search that he interviewed the witness (App. 27). Thus, this evidence was arrived at by the exploitation of the illegal search and seizure and this testimony should have been suppressed. *Wong Sun* v. *United States,* 371 U.S. 471, 488.

We also submit that the reliance by the Court of Appeals on the testimony of the Game Management agents at the motion to suppress is misplaced. The testimony of the Game Management agents was that they had received the information from persons they considered to be reliable. There was no testimony that these "informers" had ever given reliable information in the past, nor was there any testimony of personal observation which tended to corroborate the information. This Court has recognized that an arrest may be made, without warrant, on information supplied to the arresting officer by a confidential informant who has given reliable information in the past. *Draper* v. *United States,* 358 U.S. 307, and has held that a warrant may issue upon hearsay information if there is "corroboration through other sources of information." *Jones* v. *United States,* 362 U.S. 257, 271. However, in this case, there had not been information in the past, nor was there any other substantial basis for crediting the hearsay. Therefore, this hearsay could not have supported the issue of probable cause for arrest without a warrant. Reliance upon such information, we submit, cannot satisfy the "heavy burden,"

Miranda v. *Arizona,* 384 U.S. 436, 475, which the Government must meet in order to establish that the constitutional right of the petitioner, to be free from unreasonable searches and seizures, did not continue to be violated. It certainly cannot be said that this evidence was free from taint beyond a reasonable doubt. *Chapman* v. *California,* 386 U.S. 18. We therefore submit that this Court should grant a Writ of Certiorari to review this judgment in order to set the standards and burden of proof which the Government must meet in order to clear itself of taint from an illegal search and seizure.

2. This court in *Thompson* v. *City of Louisville,* 362 U.S. 199, *Shuttlesworth* v. *City of Birmingham,* 382 U.S. 87 and *Brown* v. *Louisiana,* 383 U.S. 131, has held that it is a violation of due process to convict and punish a man without evidence of his guilt. This case presents the question whether the "assumption" of facts necessary to convict similarly violates the due process clause of the Fifth Amendment. The petitioner stands convicted of possession of mourning doves in excess of the statutory limit (48) and of transportation of those same doves. The only evidence concerning possession and transportation came from the witness Andrew Williams. Williams could not testify as to how many doves were placed in the trunk of defendant's automobile. He did testify that he placed approximately ten doves in plastic bags and that he then filled freezers with the plastic bags. There was absolutely no evidence whatsoever that the total number of doves in the defendant's possession exceeded forty-eight. However, the Court of Appeals sustained the conviction on this count by stating:

> We think it can safely be assumed that each "freezer" held more than one plastic bag of doves. (App. 4)

Insofar as the Government's proof relating to transportation is concerned, it is similarly deficient. Williams testified that he directed the petitioner as to the best way to travel to Missouri and that he "presumed" it was the petitioner who honked at him while he was buying gas a little later.

We respectfully submit that the principles of the due process clause of the Fourteenth Amendment, applicable to the States, enunciated by this court in *Thompson, Shuttlesworth* and *Brown* should be made equally applicable to the Federal Government under the due process clause of the Fifth Amendment.

3. The decision of the Court below relating to the duty of the District Judge to conduct an inquiry of the jurors when newspaper articles, which are admittedly prejudicial, appear is in conflict with the decisions of this Court in *Janko* v. *United States,* 366 U.S. 716, *Sheppard* v. *Maxwell,* 384 U.S. 333, the Seventh Circuit in *United States* v. *Accardo,* 298 F.2d 133 and *United States* v. *Largo,* 346 F.2d 253; the District of Columbia in *Coppedge* v. *United States,* 272 F.2d 504, the Fifth Circuit in *Henslee* v. *United States,* 246 F.2d 190 and the Sixth Circuit in *Marson* v. *United States,* 203 F.2d 904. The trial of this case, which had been transferred to Fort Scott, Kansas because of prejudicial publicity consumed a period of two days. In the selection of the jury, ten prospective veniremen were excused because they had formed opinions based upon their exposure to publicity. At the conclusion of the evidence, counsel for petitioner brought to the attention of the court two newspaper articles which had appeared in the Kansas City newspapers, which were purchased by counsel for the petitioner, on the streets of Fort Scott, Kansas. These articles (App. 280-283) referred to the petitioner as a "gangland

figure'' and related that his prior conviction for this offense had been reversed by the United States Court of Appeals for the Tenth Circuit because of an illegal search and seizure. Defendant's Exhibit ''A'' also reported that the United States Attorney indicated that he had in his possession evidence sufficient to convict. The second article (Exhibit ''B'') again referred to the petitioner as ''gangland figure'' and again related that the petitioner had been convicted on these charges in a prior trial but the conviction had been reversed because of an illegal search and seizure. This article also erroneously reported that the District Judge had asked the witness Williams, ''Who told you to have a faulty memory?''

When these articles were called to the attention of the District Judge (App. 214-217), there was no contention made that these newspapers were not newspapers of general circulation in the State of Kansas, nor was there any contention made by the Government, and we do not anticipate any such contention here, that these newspapers were not available in Fort Scott, Kansas. The Court, however, refused to interrogate the jurors concerning their exposure to these articles as requested by the petitioner and based his refusal on the reasoning that to so interrogate at this time would be prejudicial to both the Government and the defendant (App. 216).

The Court of Appeals made an affirmative finding that the articles were in fact prejudicial (Appendix A, *infra*, p. 11) but found no error in the failure of the District Court to conduct an inquiry of the jurors to determine their exposure to these articles.

We submit that this decision is in direct conflict with the decision of this Court in *Janko* v. *United States*, 366 U.S. 716 where this Court, based upon a confession of error by

the Solicitor General, reversed a conviction on facts strikingly similar to the case of the petitioner. The trial of *Janko* lasted two days. During that two-day period, prejudicial articles appeared in the press describing Janko as a "former convict" and stating that he had been convicted of the same offense but was granted a new trial. The District Judge did not conduct an inquiry of the jurors. In confessing that this procedure was in error, the Solicitor General stated:

> "The nature of the newspaper article in question, especially in its reference to the outcome of the prior trial and to petitioner as a 'former convict' and a 'former employee of East Side rackets boss Frank (Buster) Wortman'—a recipient of considerable adverse pulicity in the St. Louis press—was such as to raise substantial doubt as to whether if it did in fact reach the jurors the inadmissible prejudicial information could be wiped out of a juror's mind. *Marshall* v. *United States,* 360 U.S. 310.
>
> "In the light of the character of the extraneous information contained in the article, we think that, before the jury was finally discharged, the trial court should have assured itself as to whether the jurors had in fact read the article"

The procedure suggested by the Solicitor General is followed in the Seventh Circuit, *United States* v. *Accardo,* 298 F.2d 133 and *United States* v. *Largo,* 346 F.2d 253; the District of Columbia, *Coppedge* v. *United States,* 272 F.2d 504, the Fifth Circuit, *Henslee* v. *United States,* 246 F.2d 190 and the Sixth Circuit, *Marson* v. *United States,* 203 F.2d 904.

Therefore, this Court should issue its Writ of Certiorari to resolve this important question in the administration of criminal justice relating to the duty of District Judges to ascertain the effect of prejudicial publicity upon jurors.

4. The decision of the Tenth Circuit relating to the separation of jurors during deliberations is in direct conflict with the decision of the Seventh Circuit in *United States* v. *D'Antonio,* 342 F.2d 667 (7th Cir. 1965) and *United States* v. *Panczko,* 353 F.2d 676 (7th Cir. 1966).

In *D'Antonio,* with no showing of actual prejudice, the Seventh Circuit held:

> At no time is it more essential that the jury should be immunized from outside influences than when it is engaged in deliberating upon what its verdict is to be. During that critical period, when the jurors are engaged in resolving vital issues between the government and the defendant, the judge certainly should not relax the traditional safeguards against outside intrusion.

In *Panczko,* the Seventh Circuit reiterated the decision in *D'Antonio,* even though the jury had been instructed not to read anything or listen to anything about the case or discuss it with anyone. 353 F.2d 676, 677, 678.

In this case, although direct reliance was placed on *D'Antonio,* and *Panczko* by the petitioner, the Tenth Circuit, without mentioning these decisions, refused to find prejudice in the separation. In so doing the Court stated that the trial court properly admonished the jury in regard to their conduct during separation. (Appendix A, *infra,* p. 11) An examination of the record however fails to disclose the admonition. The Court only told the jurors not to discuss the case during the luncheon recess. Nothing was said about exposure to publicity. (App. 242-243).

Because of the conflict within the circuits concerning the propriety of separation of jurors during deliberation in criminal cases, this Court should issue its Writ of Certiorari.

5. This court in *Griffin* v. *California,* 380 U.S. 609, held that it was a violation of a defendant's privilege against self-incrimination to allow comment by the Court and prosecutor concerning the failure of a defendant to testify, and in *Chapman* v. *California,* 386 U.S. 18, this Court held that such comment was reversible error unless it was established beyond a reasonable doubt that such a violation of the Fifth Amendment was harmless error. In the case at bar the petitioner did not elect to become a witness in his own behalf. Over the objection of the defendant, the Court instructed the jury that the petitioner could not be "compelled" to testify. Although this instruction does not allow the failure to elect to testify to be considered as affirmative evidence of guilt, by its very terms it implies that an innocent defendant would testify and as such is violative of the principles enunciated in *Griffin.* Further, the petitioner objected to the giving of any instruction relating to his failure to elect to become a witness in his own behalf. We submit that this Court should issue its Writ of Certiorari to settle the question whether an instruction relating that a defendant cannot be "compelled" to testify and "failure" to testify constitutes a prejudicial comment upon the failure of a defendant to testify when he expressly objects to any charge on the subject whatsoever, and thereby impinges upon the defendant's Fifth Amendment rights.

CONCLUSION

For the foregoing reasons, this Petition for Writ of Certiorari should be granted.

Respectfully submitted,

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APPENDIX A

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

MARCH TERM 1968

JOSEPH AIUPPA,	)	
	)	
Appellant,	)	
	)	
vs.	)	No. 9243
	)	
UNITED STATES OF AMERICA,	)	
	)	
Appellee.	)	

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF KANSAS

Maurice J. Walsh (John Powers Crowley with him on brief) for Appellant.

Newell A. George for Appellee.

Before MURRAH, Chief Judge, LEWIS, Circuit Judge, and CHRISTENSEN, District Judge.

MURRAH, Chief Judge —

On first appeal from a jury-waived trial and conviction for unlawful possession and transportation of migratory

birds, 16 U.S.C. §703, we remanded this case for a new trial with directions to suppress, as evidence, contraband [560 frozen mourning doves] seized as the fruits of an unlawful search. Aiuppa v. United States, 338 F.2d 146. On this appeal from a jury conviction and sentence on the same counts Aiuppa asserts numerous other grounds for reversal. After careful consideration of each point raised, we affirm the judgment.

Aiuppa first contends here that the Government should have been required to elect between Counts I and II of the Information. The argument is to the effect that since Count I charged possession of the birds and Count II charged transportation, and since it is necessary to have possession in order to transport, the two counts are necessarily merged. Little need be said concerning this contention, for it is conceded, as indeed it must be, that where the same act or transaction constitutes a violation of two distinct statutory provisions, the traditional test of identity of offenses is whether the same evidence is required to sustain them. See Rawls v. United States, 162 F.2d 798; Beacham v. United States, 218 F.2d 528, and cases cited; Robinson v. United States, 366 F.2d 575. We think the charges here were sufficiently separate and distinct. Under Count I proof was required to show that Aiuppa had in his possession migratory birds in excess of the number allowed by statute (24 per person). Under Count II it was necessary to prove that he did some act in furtherance of the transportation of such birds. Moreover, no where in the record before us can we find where the appellant raised such an objection at trial.

Objection is next raised to the testimony of the Government's witness, Andrew Williams, on the grounds that such testimony was the result of an investigative lead obtained

from the illegal search. It is argued that Williams was not interviewed by the Government until after the illegal search and that the Government failed to sustain the burden of establishing that the lead did not emanate from that search. Suffice it to say that the record clearly reflects that prior to the illegal search the Government received information from an informer to the effect that Aiuppa had been hunting in the Frontenac-Pittsburg, Kansas, area with well-known people; that "they had killed an enormous amount of doves" and that Williams was cleaning the doves, packaging them and placing them in cold storage. Since knowledge of these facts was gained prior to and independently from the illegal search, they may be proved like any other facts. See Wong Sun v. United States, 371 U.S. 471; Silverthorne v. United States, 251 U.S. 385. Such independently gained information does not become tainted merely because the same information is subsequently discovered during an illegal search. See Burke v. United States, 328 F.2d 399.

It is also urged that even considering the testimony of Andrew Williams, the evidence was insufficient to prove that Aiuppa either possessed or transported mourning doves in excess of the statutory limit [24 per person or a total of 48 for Aiuppa and his wife]. The argument is that there was no direct testimony that the birds in question were mourning doves protected under the provisions of §703 and that the only testimony as to how many birds were placed in Aiuppa's automobile consisted solely of assumptions and guesses.

Many times we have said that in determining the sufficiency of the evidence to support a jury verdict, we are constrained to view the evidence in the light most favorable to the Government and to examine such evidence only to

determine whether the jury was justified in finding beyond a reasonable doubt that the defendant was guilty of the offense charged. See Elbel v. United States, 364 F.2d 127; VanNattan v. United States, 357 F.2d 161; Reed v. United States, 377 F.2d 891. And, it is equally important to bear in mind that in so viewing the evidence it is not our function to determine the weight of the evidence or assess the credibility of the witnesses. See Lucas v. United States, 355 F.2d 245, and cases cited. Applying these rules, we cannot say the evidence here did not support the verdict. Andrew Williams testified that during approximately a two-week period he cleaned between nine and fourteen hundred mourning or turtle doves and placed them in plastic bags for various hunters, including Aiuppa, in the Frontenac-Pittsburg, Kansas, area; that these doves were then placed in cold storage in the Dairy Land Freezer in Frontenac; that he placed approximately ten doves in each plastic bag and then filled "ordinary freezers" with the plastic bags. Without giving linear dimensions Andrews indicated by hand motions to the jury the approximate size of the freezers or cartons in which the bags of doves were placed.[1] He also testified that he placed one of these cartons in the rear of Aiuppa's car and thereafter saw where three others had been placed in the rear of the car; that Mr. and Mrs. Aiuppa were sitting in the car and that he (Williams) directed them as to the best way to "get out of town to Missouri". By way of identifying the contraband game, Mrs. Williams testified that she assisted her husband on at least one occasion in cleaning some mourning or turtle doves. Ronald Tims also testified that he assisted Mr. Williams in cleaning turtle doves. From all of this evidence we think the jury

[1] We think it can safely be assumed that each "freezer" held more than one plastic bag of ten doves.

was justified in finding that Aiuppa possessed and transported more than 48 mourning doves in violation of §703.

Complaint is next made of the prosecutor's commenting on the memory of witness Williams and calling as witnesses two other persons who had previously informed him they would refuse to testify. During the trial, while Government witness Williams was testifying on direct examination and having difficulty recalling specific details, the prosecutor asked him, "Who told you to have a faulty memory?" Aiuppa's counsel immediately objected and upon motion the Court ordered the testimony stricken and directed the jury to disregard it.

We agree with appellant that the statement by the prosecutor was unnecessary and improper. But, every slight excess of the prosecutor does not require that a verdict be overturned and a new trial ordered. United States v. Borda, 285 F.2d 405. And, such an error can generally be cured, as indeed it was here, without harmful effect upon a defendant by the trial court's striking the testimony of comment and admonishing the jury to disregard it. Lawrence v. United States, 357 F.2d 434; Drew v. Lawrimore, 380 F.2d 477, and cases cited; and see Singer v. United States, 380 U.S. 24, 38.

As to the allegation that the Government prejudicially called two witnesses who had advised the court they would invoke the protection of the Fifth Amendment and refuse to testify, both sides rely upon United States v. Compton, (CA 6), 365 F.2d 1, 5, wherein the court stated:

> "Government counsel need not refrain from calling a witness whose attorney appears in court and advises court and counsel that the witness will claim his privilege and will not testify. However, to call such a witness, counsel must have an honest belief that the wit-

> ness has information which is pertinent to the issues in the case and which is admissible under applicable rules of evidence, if no privilege were claimed. It is an unfair trial tactic if it appears that counsel calls such a witness merely to get him to claim his privilege before the jury to a series of questions not pertinent to the issues on trial or not admissible under applicable rules of evidence."

It is argued that there was no showing by the Government that either of these witnesses had information pertinent to the issues in the case, and that the only purpose for calling them was to get them to claim privilege before the jury, leaving the inference they were hiding something.

The record indicates that a Kansas attorney appeared during the trial and informed the court that he represented "a number of witnesses who feel that they should, under the circumstances, refuse to testify as they might incriminate themselves." No where can we find where the "number of clients" were identified by name or that these two witnesses were identified as being among those represented by the attorney. Moreover, both of these witnesses had testified in the first trial and in this trial were asked only a few pertinent questions, such as whether they had hunted with the accused. Immediately upon claiming the privilege of the Fifth Amendment, each was excused from further testifying. We cannot say that the Government did not honestly believe the witnesses had pertinent information nor that under the circumstances it was prejudicial to attempt to elicit such information from them.

The next allegation of error is directed at the court's permitting two government agents each to testify to the effect that he is employed by the Department of Interior and is custodian of the records in his respective region;

that he had searched the records in his region and could find no record of an application or permit for Aiuppa to possess more than the statutory limit of mourning doves. The argument is to the effect that the best evidence would have been the records themselves and that failure of the witnesses to produce the records from which they made their search deprived Aiuppa of his constitutional right to cross-examine witnesses against him. Reliance is placed upon United States v. Rohalla (CA7), 369 F.2d 220, wherein the court held it was prejudicial error to permit an F.B.I. agent to testify that he had examined a license registration book published by the Secretary of State's office and had determined that a certain license number was issued to the defendant, Rohalla. The court in that case reasoned that "There was no way that defense counsel could by cross-examination of agent Williams effectively challenge the authenticity or accuracy of a book that was not produced in court." Id. 224. But, we think that case is easily distinguished from ours. In Rohalla the Government was attempting to prove an entry in an official book, but the agent testifying did not purport to be the official custodian of the records he had examined. And, the court was careful to note that "The book which should have been produced in open court was available to the government and was at that time in the same building where the trial was being conducted." In our case the Government was attempting to prove the absence of an entry in an official set of records by the testimony of the official custodians. Rule 27 F.R.Cr.P. and Rule 44(b) F.R.C.P. specifically provide that "A written statement that after diligent search no record or entry of a specified tenor is found to exist in the records designated by the statement * * * is admissible as evidence that the records contain no such record or entry." And, Rule 44(c) provides that "This rule does not prevent the proof of * * * lack of entry therein by any

other method authorized by law." Thus, "to establish the fact that there is no record as to a particular matter or thing, parol evidence may be given." Jackson v. United States, 250 F.2d 897, and authorities cited. We can, therefore, see no error in allowing the Government to negate the issuance of a permit to Aiuppa without producing the records. And, see also dissent in United States v. Rohalla, supra.

Aiuppa next urges that it was prejudicial error for the trial court to instruct the jury that

> "The law does not compel a defendant in a criminal case to take the witness stand and testify, and no presumption of guilt may be raised, and no inference of any kind may be drawn, from the failure of a *defenant* to testify.
>
> "The legal theory for this rule is immaterial so far as you are concerned, but the important and vital point for you, as jurors, is that a defendant has the unqualified right not to take the stand and you may not in any manner draw any inference against the defendant because he did not take the stand."

It is argued that the language of the instruction amounts to a prejudicial comment on the failure of a defendant to take the stand, prohibited in Griffin v. California, 380 U.S. 609.[2] But, we cannot agree. We know, of course, that such an instruction must be given if requested, i.e. see United States v. Schabert, 362 F.2d 369, and cases cited.

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[2] In Griffin the court was concerned with the California "Comment Statute" which provided that a defendant's failure "to explain or to deny by his testimony any evidence or facts in the case against him may be commented upon by the court and by counsel, and may be considered by the court or the jury." The Supreme Court held that this violated the Fifth Amendment prohibition against self-incrimination.

While it may be the better practice not to charge on this subject unless specifically requested by a non-testifying defendant, it is not reversible error to do so. Id. 372. When couched in such careful terms as used here, we do not think the charge can be said to be more than "a faithful compliance with the 'implied direction' given district judges by Congress to fulfill 'their traditional duty in guiding the jury by indicating the consideration relevant to the latter's verdict on the facts.'" Coleman v. United States, 367 F.2d 388, citing and quoting from Bruno v. United States, 308 U.S. 287, 293. See also United States v. Tannuzzo, 174 F.2d 177; Affronti v. United States, 145 F.2d 3.

Lastly, Aiuppa contends that it was error for the trial court to refuse to grant a mistrial based upon prejudicial newspaper publicity, or, in the alternative, to at least voir dire the jurors whether they had read the newspaper publicity and were prejudiced thereby. He further argues that it was error for the court to permit the jury to separate for lunch during their deliberations and prior to the verdict so as to expose them to the prejudicial publicity and other possible influencing factors.

At the conclusion of all the evidence, and before the jury had been instructed, Aiuppa's counsel moved for mistrial on the grounds that the jury could not "reasonably give us a fair trial" due to two current newspaper stories. One of these stories was published on the first day of trial in the Kansas City Star and was headlined on page 4, "Jury Selected in Aiuppa Case. Chicagoan's Trial in U.S. District Court in Fort Scott Kansas." A subheadline read "Gangland Figure Found Guilty in 1963 but Won Appeal". The article went on to discuss Aiuppa's first trial, conviction and sentence and the suppression by this court of "more than 500 doves" found "in the trunk of the Aiuppa

Cadillac." The second article was published on the second day of trial in the Kansas City Times and was headlined, "Two Freeze Up in Aiuppa Case; Government Witnesses Refuse to Answer in Second Trial. Now Vague on Details". A subheadline erroneously read, "Judge Asks One 'Who Told You' to Forget Answers?" This article then recited various occurrences at the trial.

Judge Templar noted that "this has always been a problem for the trial courts, and under the provisions of the First Amendment I know of no way that this court can prevent an irresponsible newspaperman from publishing anything he wishes to publish * * *. This is apparently presenting some very serious problems for the courts * * *." But, he determined that "in order to grant a mis-trial in this case [the Court] would have to assume that the jurors have read this article and that it had left an impression and they believed what they read and took it into consideration. Now, the Court is specifically instructing them not to do this, and the Court feels that to grant your request [for voir dire of the jury] will not be proper. In fact it would have just the opposite effect in the establishment of a fair trial because it would then call to their attention something that may not have arrived at their attention." Thereafter, the court instructed the jury to the effect that "you are to disregard any information about this case which may have been received from sources outside of this trial. If any of you have read any newspaper articles or heard any radio broadcasts or telecasts related to this case, I want to caution you particularly that you are to put any such information entirely out of your consideration of this case, and you are to confine your consideration solely to the evidence adduced in this trial."

Each case relating to a claim of jury prejudice based on newspaper articles appearing during a trial must turn on its own special facts. See Marshall v. United States,

360 U.S. 310, 312. We have very recently considered the general problems confronting and principles applicable to the majority of cases of this type concluding that "The right to publish a prejudicial article does not carry with it the right of an accused to an automatic mistrial." Mares v. United States, Aug. 15, 1967, 10 CA, ... F.2d ..... We cannot say, from the facts in this case, that the published newspaper stories deprived Aiuppa of a fair trial. The stories were, to be sure, prejudicial. But, they were published in newspapers at least 100 miles from the scene of the trial. And, there is nothing in the record to indicate that they were generally circulated, or for that matter circulated at all, in the vicinity of the trial or that the jurors would likely be exposed to them outside of deliberately seeking them out. We will not presume either exposure or prejudice, i.e. see Welch v. United States, 371 F.2d 287, nor will we, in a case like this, impute to a jury a disregard of its duty to confine its verdict to the evidence adduced at the trial. And see Mares v. United States, supra. We think the trial judge took reasonably precautionary steps under the circumstances by instructing the jury to disregard any such publicity it might encounter.

As to whether the jury should have been allowed to separate for lunch, we have said that "sequestration imposes a hardship on jurors and should be ordered only in unusual cases." Mares v. United States, supra. As we have seen, there is nothing in the record to indicate that the jurors were exposed to the newspaper articles in question. And, we will not presume prejudice from such a separation where, as here, the trial court properly admonished the jury in regard to their conduct during separation. See Roth v. United States, 339 F.2d 863; and see Hines v. United States, 365 F.2d 649.

The judgment is affirmed.

APPENDIX B

MARCH TERM, THURSDAY, APRIL 25, 1968

Before Honorable Alfred P. Murrah, Chief Judge,
Honorable David T. Lewis, Circuit Judge, and
Honorable A. Sherman Christensen, District Judge.

JOSEPH AIUPPA, *Appellant,*	)	
9243 vs.	)	Appeal from the United States District Court for the District of Kansas.
UNITED STATES OF AMERICA, *Appellee.*	)	

This cause came on to be heard on the transcript of the record from the United States District Court for the District of Kansas and was argued by counsel.

On consideration whereof, it is ordered and adjudged by this court that the judgment of the said district court in this cause be and the same is hereby affirmed.

It is further ordered by this court that Joseph Aiuppa, appellant, surrender himself to the custody of the United States Marshal for the District of Kansas, in execution of the judgment and sentence imposed upon him, within ten days from and after the date of the filing of the mandate of this court in said district court.

A true copy
Teste
William L. Whittaker
William L. Whittaker
Clerk, U. S. Court of
Appeals, Tenth Circuit

(SEAL)

APPENDIX C

Joseph AIUPPA, Appellant,

v.

UNITED STATES of America, Appellee.

No. 7560.

United States Court of Appeals, Tenth Circuit
November 9, 1964

Maurice J. Walsh, Chicago, Ill., for appellant.
Newell A. George, U. S. Atty., for appellee.
Before MURRAH, Chief Judge, and HILL and SETH, Circuit Judges.

MURRAH, Chief Judge:

This is an appeal from a conviction and sentence by the Court, a jury having been waived, on a two-count Information charging the appellant with unlawful possession and transportation of migratory birds (mourning doves), in violation of 16 U.S.C. § 703.[1]

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[1] 16 U.S.C. § 703 provides: "Unless and except as permitted by regulations made as hereinafter provided in sections 703-711 of this title, it shall be unlawful at any time, by any means or in any manner, to pursue, hunt, take, capture, kill, attempt to take, capture, or kill, possess, offer for sale, sell, offer to barter, barter, offer to purchase, purchase, deliver for shipment, ship, export, import, cause to be shipped, exported, or imported, deliver for transportation, transport or cause to be transported, carry or cause to be carried, or receive for shipment, transportation, carriage, or export, any migratory bird, or any part, nest, or egg of any such birds, including in the terms of the conventions between the United States and Great Britain for the protection of migratory birds concluded August 16, 1916 (39 Stat. 1702), and the United States and the United Mexican States for the protection of migratory birds and game mammals concluded February 7, 1936."

On pre-trial the appellant moved, pursuant to Rule 41(e), F.R.Crim.P. that the seized property "to-wit, approximately 560 frozen birds * * * be returned to him and that said property be suppressed for use as evidence," on the ground that "[s]aid unlawful search and seizure was made in the nighttime from an automobile belonging to the [appellant] and located upon the premises * * * which constitute his home, and the seizure was against his will and without a search warrant."

Pursuant to a hearing on the motion to suppress, the trial Court specifically found " * * * there was a search of [appellant's] effects, the automobile"; that "there was no consent to the search of the automobile, either voluntary or otherwise"; that "the search was not incident to a lawful arrest"; and "there was a seizure." The Court then observed that the only question on the motion to suppress was "whether there was probable cause for this search." The Government agreed, and the search and seizure was finally sustained and the seized doves admitted in evidence against the appellant, on the ground that the Agents had probable cause for the search without a warrant.

The search and seizure of the mourning doves was conducted by Federal Game Management Agents acting under authority of 16 U.S.C. § 706,[2] which pertinently

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[2] On trial, one of the Government Agents testified as follows:

"Q. [By defense counsel] Now, are you — that is the total of your authority as an officer, isn't it, you are a game management officer for the government? A. Yes, sir.

"Q. You don't hold any commission or office as any other type of enforcement officer? A. No, sir.

"Q. Or civil officer? A. No, sir.

"Q. And you know, do you not, that these offenses you were investigating were misdemeanors? A. I know that, sir.

provides that such Agents " * * * shall have power, without warrant, to arrest any person committing a violation of said sections [16 U.S.C. §§ 703-711] in his presence or view and to take such person immediately for examination or trial before an officer or court of competent jurisdiction; * * * and shall have authority, with a search warrant, to search any place." The statute also authorizes judges and commissioners " * * * upon proper oath or affirmation showing probable cause [to], issue warrants in all such cases."

On appeal the Government seems to admit, as indeed it must, that the Agents were acting solely under authority of § 706, supra. It does not contend that the search was made as an incident to a lawful arrest or under authority of a search warrant. In these circumstances, we do not have the question of the power and authority of a private person to search and seize as an incident to a lawful arrest, as in Wion v. United States (10 C.A.), 325 F.2d 420. Nor, do we have the question of the authority of the Agents to seize and then search a vehicle for contraband, as in Sirimarco v. United States (10 CA), 315 F.2d 699. The Government seeks to sustain the search and seizure solely

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"Q. And are you familiar with Section 706 of Title 16 of the United States Code?

* * * * *

"A. Yes, I'm familiar with this section.

"Q. And that section outlines your authority in connection with the migratory game bird treaties and laws under it?

"A. Yes, sir.

"Q. And did you have in mind at the time that you made this search, this arrest and search, that you should have authority with a search warrant to search any place? A. No, sir.

"Q. You didn't have a search warrant of course?

"A. No, sir."

on the ground that its Agents, acting within the scope of their statutory authority, were impowered to search and seize without a warrant for probable cause. On this premise it contends that the evidence on the motion to suppress supports the trial Court's finding of probable cause.

The fallacy of this premise is that it assumes the power to make a warrantless search on probable cause — a power which the statute (§ 706, supra) does not grant and, by plain implication, withholds from these special enforcement Agents. While the statute authorizes an arrest without a warrant for violations committed in the Agent's presence or view, it does not authorize a warrantless search. Instead, it expressly delegates to judges and commissioners authority to issue warrants in all such cases, upon a proper showing of probable cause. It is thus manifestly clear, we think, that Congress deliberately withheld from these Agents the province of determining for themselves the existence of probable cause and the exceptional circumstances which would justify an expeditious warrantless search. This interpretation of the statute is consonant with the highly restricted province of any enforcement officer to appraise the extraordinary circumstances under which a search without a warrant would be justified. See: Aguilar v. Texas, 378 U.S. 108, 84 S.Ct. 1509, 12 L.Ed.2d 723; Brinegar v. United States, 338 U.S. 160, 69 S.Ct. 1302, 93 L.Ed. 1879; Johnson v. United States, 333 U.S. 10, 68 S.Ct. 367, 92 L.Ed. 436; Taylor v. United States (10 CA), 333 F.2d 721; United States v. One 1957 Ford Ranchero Pick-up Truck (10 CA), 265 F.2d 21; and Hart v. United States (10 CA), 162 F.2d 74.

The motion to suppress did not specifically refer to the statutory limitations of the searching Agents, but it was made pursuant to Rule 41(e) and followed the prescribed

Form 16, F.R.Crim.P. In this form, it was certainly sufficient to challenge the lawfulness of the seizure and the supportive evidence was entirely sufficient to require the Government to legally justify the search without a warrant. The Government does not now complain of appellant's failure to specifically invoke § 706, supra. Indeed, it does not deny that the statute is the full measure of the Agents authority in this case. We hold that the search and seizure was conducted without statutory authority and, therefore, cannot be sustained for probable cause. The motion to suppress should have been granted, and the case is reversed with directions to proceed accordingly.